6-1-1976

Comments and Observations Regarding the *Juicio de Amparo* and Arbitration Proceedings in Mexico

B. Civil liability — tort, in general; product liability, in particular.

C. Laws restricting bank secrecy — Title II — Reports of Currency and Foreign Transactions — Federal Deposit Insurance Act — currently being reviewed on appeal.

February, 1976

COMMENTS AND OBSERVATIONS REGARDING THE *JUICIO DE AMPARO* AND ARBITRATION PROCEEDINGS IN MEXICO

1. The procedural remedy of *amparo* in Mexico is established in Art. 103 and 107 of the Federal Constitution and, consequently, forms part of the highest level within the hierarchy of "positive" law in Mexico and cannot be superseded by other treaties, laws, codes and rules. Such Art. 103 and 107 are regulated by the *Ley de Amparo, inter alia,* which apparently also enjoys precedence over other local and federal laws (*"La Ley de Amparo, por ser reglamentaria de los artículos 103 y 107 constitucionales, está colocada en un plano superior de autoridad, respecto de cualesquiera otras leves de carácter local o federal . . ."Semanario Judicial de la Federación,* Appendix to Volume CXVIII, p. 1420).

Briefly, the remedy of *amparo* is a petition by an aggrieved party to obtain the review by federal courts of an alleged violation of individual rights. Such remedy may be petitioned only by individuals against the acts of legislative, administrative or judicial "authorities" *(autoridades)* concerning "final judgments" *(sentencias definitivas).* The court hearing the *amparo* petition will only decide the issue of whether there has been a violation of individual rights and will not make a general declaration regarding the legal provision or act underlying any such alleged violation.

2. Although all Mexican States have their own Code of Civil Procedure and most of such codes contain provisions governing arbitration (the major exception being the Federal Code of Civil Procedure), the majority of such code provisions have been either modeled after or are similar to the applicable text of the Code of Civil Procedure for the Federal District (the "Code"), which will be used herein when referring to Mexican local law governing arbitration (Art. 609 through 636) and the recognition of foreign judgments (Art. 599-608).

Article 619 (" . . . *Las partes podrán renunciar a la apelación. Cuando el compromiso en árbitros se celebre respecto de un negocio en grado de apelación, la sentencia arbitral será definitiva, sin ulterior recurso.*") and Art. 632 ["*Notificado el laudo, se pasarán los autos al juez ordinario para su ejecución, a no ser que las partes pidieren aclaración de sentencia. Para la ejecución de autos y decretos, se acudirá también al juez de primera instancia. Si hubiere lugar a algún recurso que fuere admisible, lo admitirá el juez que recibió los autos y remitirá estos al Tribunal Superior, sujetándose, en todos sus procedimientos, a lo dispuesto para los juicios comunes.*"] provide for both the appeal of arbitral awards and the waiver of such right to appeal. Art. 635 (*La apelación sólo será admisible conforme a las reglas del derecho común. Contra las resoluciones del árbitro designado por el juez cabe el amparo de garantías, conforme a las leyes respectivas.)* expressly provides that the remedy of *amparo* will apply to arbitral awards decided thereunder. It is interesting to note in this regard that the Codes of Civil Procedure of a number of Mexican States do not contain specific provisions concerning the applicability of the *amparo* remedy to arbitral awards decided thereunder (e.g. Chihuahua, Jalisco o, Michoacán, Nuevo León Oaxaca, Sinaloa, Sonora).

3. The execution of arbitral awards in Mexico is governed by Art. 444 (*juicio ejecutivo*) and 504 (*vía de apremio*) of the Code. Under procedures presently existing in Mexico, a domestic arbitral award handed down by the arbitrators is not considered a judicial judgment until it is recognized as such by the competent judge pursuant to Art. 632 of the Code (*exequatur*). Once the competent judge has ruled on the *exequatur* of the arbitral award, such award may be executed in accordance with Art. 444 or 504 of the Code. Similarly, foreign awards are considered foreign judgments and will not be recognized or executed in Mexico until a competent judge has ordered the *exequatur* thereof pursuant to Art. 599-608 of the Code [The effect of the United Nations' Convention on the Recognition and Enforcement of Foreign Arbitral Awards has not been taken into consideration for purposes hereof, since Mexico acceded to such Convention only on April 14, 1971 and there has not yet developed very much case law (*jurisprudencia*) or commentary (*doctrina*) in connection with this topic.]

Although the view presently prevailing in Mexico appears to support the position that the *exequatur* of a domestic arbitral award should be ordered as a matter of course and that such arbitral award should not be revised on the merits by the judge undertaking the *exequatur* thereof, unless a basic element of procedural due process was not duly complied

with, this point is by no means settled. Some commentators, Lic. Jesús Toral Moreno, among others, suggests that the competent judge may refuse to order the *exequatur* of an arbitral award in the following situations: (i) the arbitration procedure included nonarbitral matters. (Art. 615); (ii) the dispute was not properly indicated in the *compromiso* (Art. 616); (iii) the arbitral award was not decreed within the stipulated time period (Art. 617 and 622); (iv) the arbitration was decided in accordance with principles of equity (and not according to principles of law) and such equity procedure was not set forth in the arbitration agreement or the *compromiso* (Art. 628); (v) the arbitrators were not chosen in the proper manner or by someone not enjoying his full legal rights (Art. 612 and 614); (vi) one or more of the arbitrators were incapable or prohibited from performing their duties (Art. 222, 612, 613, 616 and 622); and (vii) the nomination of any of the arbitrators was revoked expressly and unanimously by all parties (Art. 681). (See "El Arbitraje y el Juicio de Amparo", *Jus, Revista de Derecho y Ciencias Sociales*. Vol. XXXVII, No. 154, pp. 601-631).

4. There appears to be two different viewpoints among Mexican legal scholars regarding whether the remedy of *amparo* can be used directly against an arbitral award or whether such remedy of *amparo* can be used only following the *exequatur* or judicial recognition of the arbitral award. The latter position, holding that the remedy of *amparo* can be used only against arbitral awards duly recognized by the competent judge as legal decisions, either through *exequatur* proceedings or following its appeal to the court of second instance, appears to be the prevailing view and is supported *inter alia*, in the following case law: *Compañía Mexicana de Petróleo El Aquila, S.A.) (Semanario Judicial de la Federación*, Supplement to Volume of July, 1933, pp. 852-833); *Construcciones e Inversiones Urbanas, S.C. (Semanario Judicial de la Federación*, Vol. XCVII, p. 630); *Signoret Honnorat Cia., Sucs. (Semanario Judicial de la Federación*, Vol. III, p. 870); *Benito Sierra (Semanario Judicial de la Federación*, Vol. VI, p. 922); and decision cited in *Semanario Judicial de la Federación*, Vol. LXXIII, p. 453. The rationale of such position is that arbitrators do not act in the capacity of *autoridades* (except with respect to the *Juntas de Conciliación y Arbitraje* provided for in Art. 123 of the Federal Constitution) and, therefore, the awards handed down by them cannot be the object of an *amparo* proceeding.

Notwithstanding the foregoing, there is still some commentary in support of the position that an *amparo* proceeding can be used directly against the arbitral award, before it has been "judicially" recognized by

the competent court. The rationale of such position is based on the assumption that the arbitrators are competent authorities (*autoridades competentes*), even though of a provisional (*transitoria o accidental*) nature, The reasoning of this position is set forth in greater detail in the book entitled *El Arbitraje en el Derecho Privado,* by Lic. Humberto Briseño Sierra, pp. 276-281 (*Instituto de Derecho Comparado, Universidad Nacional Autónoma de Mexico,* Mexico City, Mexico, 1963). Mexican case law in support of this position includes, *inter alia,* the following: Decision of the *Suprema Corte de Justicia* of November 19, 1906 (District of Guanajuato); dictum in the decision entitled *Compañía Petrolera Comercial, S.A. (Semanario Judicial de la Federación,* Vol. XXXII, p. 451); decisions dated April 23, 1910, July 11, 1911, and July 19, 1911; decision cited in *Semanario Judicial de la Federación,* Vol. LXXXIX, p. 3392.

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New York City, March, 1976